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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1006

FIRST MULTIFUND FOR DAILY INCOME, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

FIRST MULTIFUND FOR DAILY INCOME, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner seeks a Writ of Certiorari to review an Order of the United States Court of Claims denying petitioner's Motion for Summary Judgment. The Court of Claims has promulgated an unprecedented and startting interpretation of Section 6 of the Securities Act of 1933 (the "Act").[1] In so doing, it has departed from the express mandate of the Act, ignored its legislative history and failed to follow the express mandate of provisions of the Administrative Procedure Act,* all of which has operated to deny to petitioner the due process of law.

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[1] 15 USC §77f.

*5 USC §551, *et seq.* (hereinafter "APA").

The decision below adversely affects not only petitioner but also all other investment companies regulated by the Act and by the Investment Company Act of 1940 ("1940 act").[2] For this reason, it is most important that this Court examine the Court of Claims' interpretation of the Act to see whether, in fact, such an interpretation is required by law or whether it is confiscatory and revolutionary and contrary to the intent of Congress.

OPINION BELOW

The opinion of the United States Court of Claims (602 F.2d 332) is annexed hereto as Appendix A.

JURISDICTION

The Court of Claims' order denying petitioner's motion for summary judgment and granting respondent's cross-motion for summary judgment was entered on July 28, 1979. A timely motion for rehearing was denied by order of the Court of Claims on September 28, 1979. This Court has jurisdiction under 28 USC §1255.

QUESTIONS PRESENTED

1. Does Section 6 of the Securities Act of 1933 require petitioner and all other mutual funds to pay a registration fee to the Securities and Exchange Commission on previously registered, issued, and redeemed shares for which a fee has been previously paid?

[2]15 USC § 80a-1, *et seq.* As of Dec. 1978, there were 503 mutual funds registered with the Securities and Exchange Commission pursuant to Section 8 of the 1940 Act (15 USC §80a-8), all of which are subject as well to section 6 of the Act. (Wiesenberger Investment Co. Service, 1979 Edition).

2. If so, has the SEC and the court below rendered Section 6 unconstitutional as applied because it operates to deprive petitioner of property without due process of law?

3. Do Sections 552(a)(1)(D) and 552(a)(1)(E) of the Administrative Procedure Act require the SEC to publish interpretations of general applicability in the Federal Register before such statements may be applied to petitioner?

4. If so, has the SEC and the court below denied to petitioner due process of law in that their interpretation of Section 6 as applied to petitioner is based upon a secret, unwritten and unpublished interpretation of general applicability pertaining to that section?

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Act, the 1940 Act and the APA are set forth in Appendix C hereto.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claim herein is based upon the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

Petitioner is an open-end, diversified management investment company, *i.e.*, a "mutual fund" that sells its shares to and on demand redeems them from the public at a price based on a pro rata share of the net asset value of the fund. As such, petitioner is required to

register with the Securities and Exchange Commission ("SEC") as a registered investment company pursuant to Section 8 of the 1940 Act (15 USC §80a-8). In addition, petitioner is required to register with the SEC the securities that it offers for public sale pursuant to Section 6(a) of the Act (15 USC §77f(a)), and to pay to the Commission a filing fee based upon the aggregate offering price of the securities registered pursuant to Section 6(b) of the Act (15 USC §77f(b)). Like other open-end funds that redeem their securities on demand, petitioner continuously sells and redeems its securities.

From August 1974 to February 1977, petitioner filed with the Commission five (5) registration statements covering a total of 1,650,000 shares and paid the prescribed registration fees of one-fiftieth (1/50th) of one percent (1%) of the aggregate offering price. During this same time period, petitioner registered and paid fees on an additional 3,016,591 shares by filing post-effective amendments to its registration statements pursuant to Section 24(e) of the 1940 Act (15 USC §80a-24(e)). On March 17, 1978, petitioner filed a registration statement covering 4,660,591 shares and paid a registration fee of $9,833 for re-registration of all previously registered, issued and redeemed shares.

Petitioner was forced to re-register such shares because the Commission, in Securities Act of 1933 Release No. 33-5836,[3] for the first time publicly expressed its view that all previously registered, issued and redeemed shares must be re-registered and that the issuer must pay a double-tax or registration fee. Subsequent to re-registering its shares and paying the prescribed fee, petitioner filed suit in the Court of Claims seeking to recover the $9,833 fee paid, charging that the requirement that it pay registration fees on shares previously registered, issued and redeemed constitutes a taking of its property in violation of the Fifth Amendment. The Court of Claims exercised jurisdiction over petitioner's claim under the Tucker Act, 28 USC §1491.

[3]Securities Act of 1933 Rel.No. 33-5836/June 16, 1977 (attached hereto as Appendix D has the effect of requiring registration fees to be paid for all redeemed shares but the import of the release is that it waives the 1/50th of 1% tax authorized by Section 6(b) of the Act for the number of shares redeemed or repurchased in the previous fiscal year. Accordingly, the release is directed at waiver of the fee imposed by Section 6(b) because of the Commission's recognition that "(t)his method of calculation may result in inordinately high registration costs for open-end management companies and their shareholders and may unfairly burden the registration process for this type of issuer." (Securities Act of 1933 Rel. No. 33-5817) (the notice of proposed rulemarking released prior to adoption of the rule in Release 33-5836, *supra.*) Thus, the Commission merely states as an aside in the notice of proposed rule-making its view—the very view that is challenged by petitioner — that "all securities offered or sold by an issuer are subject to the registration requirements of the 1933 Act, notwithstanding the fact that such securities may have been redeemed or repurchased by the issuer subsequent to their earlier sale by the issuer pursuant to a registration statement." *Id.*

REASONS FOR GRANTING THE WRIT

Special and important reasons exist such that this Court should review the order of the court below. First, the court has erroneously interpreted an important section of the Securities Act of 1933 that affects not only petitioner but the whole of the mutual fund industry because the law, as interpreted, has exacted and continues to exact an illegal tax as a registration fee. Second, the decision of the court below renders Section 6(b) of the Act unconstitutional as applied because it operates to deprive petitioner of property without due

process of law. And lastly, the decision below denies petitioner due process of law because the Court refused to follow and apply the clear mandate of provisions of the APA.

I. THE COURT BELOW HAS ERRONEOUSLY INTERPRETED AN IMPORTANT SECTION OF THE SECURITIES ACT OF 1933 WHICH HAS NOT BEEN, BUT SHOULD BE, INTERPRETED BY THIS COURT.

The Court of Claims has interpreted Section 6(b) of the Act as requiring petitioner and all other mutual funds to pay a double registration fee on all shares that were previously registered, issued, redeemed and reissued in the secondary market. The consequences of this erroneous interpretation are both widespread and extreme; both to petitioner which has been forced to pay $9,833 in double registration fees and to all other mutual funds which over the years have paid untold millions of dollars to the Commission in the form of double registration fees.[3a]

In light of these far-reaching consequences and for the reasons set forth below, petitioner submits that the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision below turns upon "the Commission's settled administrative interpretation" of Section 6(b), which

[3a]E.g., mutual fund shareholders "redeemed" $16,668,709,000 and $31,526,883,000 in shares in 1977 and 1978 respectively, with sales amounting to $17,072,676,000 and $37,157,548,000 in those years. The double tax imposed by a second imposition of the 1/50 of 1% filing fee on such redeemed shares cost the consumer an unnecessary $9,643,118.40 in those two years alone; and no additional investor protection was provided thereby. *1979 Mutual Fund Fact Book,* Investment Company Institute.

in turn is dependent upon a statement of the Commission in 1977 that it had "consistently taken the view that, absent an available exemption . . . securities . . . sold by an issuer are subject to the registration requirements of the 1933 Act . . . notwithstanding the fact that such securities may have been redeemed or repurchased by the issuer subsequent to their earlier sale by the issuer pursuant to a registration statement."[4] Such a view is plainly inconsistent with the legislative history of Section 6(b).[5]

In reporting the bill which became the Securities Act of 1933, the appropriate committee of Congress stated in its report that:

> "[I]t (the Securities Act of 1933) does not affect the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering."[6]

The sale in the secondary market by petitioner of securities previously registered and redeemed through purchase of the shares in the secondary market, does not take on the "characteristics of a new offering."[7]

[4]Securities Act of 1933 Release No. 33-5817.

[5]The court below, in accepting this view, has also run afoul of the principle enunciated by this Court in *Cort v. Ash,* 422 U.S. 78 (1975), that state law governs the affairs of a corporation unless federal law expressly requires otherwise. Here, Section 102(a)(14) of the New York Business Corporation Law governs and shares redeemed by petitioner become "treasury shares", *i.e.,* those which have been "issued, have been subsequently acquired, and are retained uncancelled by the corporation." *Id.* As such, the SEC cannot lawfully require petitioner to re-register the shares because they have been at all times "issued" under state law.

[6]H.Rep. No. 85, 73rd Cong., 1st Sess., pg. 5 (1933).

[7]In this regard it should be noted that 229,493,791,000 shares were purchased and resold in the secondary market in 1978 and none of these shares were required to be re-registered prior to

Moreover, the Court of Claims completely ignored the fact that investor protection with respect to petitioner's shares is complete and that re-registration serves no useful purpose. All securities offered or issued by petitioner have been registered as set forth hereinabove, and the registration statements have contained all of the information required by Section 5 of the Act,[8] including a prospectus that meets the requirements of Section 10(a) of the Act.[9] In addition, all sales of securities by petitioner have been accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10 of the Act, as required by Section 5(b)(2) of the Act.[10]

Since petitioner's shares are in continuous offering, its shares consequently must be in continuous registration.[11] This is accomplished by filing a new registration statement or a "post-effective amendment" from time to time which keeps the prospectus current,[12] pursuant to the procedure described in Section 24(e) of the 1940 Act.[13] Even the Commission's own Rules provide that such an updated prospectus shall be deemed to meet all requirements for use in connection with the securities that were covered by an earlier registration statement.[14]

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subsequent sales. (N.Y.S.E. and Am. Ex., 1978 SEC Annual Report to Congress).

[8]15 USC §77e.

[9]15 USC §77j(a).

[10]15 USC §77e(b)(2).

[11]15 USC §77e(a).

[12]Section 10 of the Act (15 USC §77j) provides that "when a prospectus is used more than 9 months after the effective date of the registration statement, the information contained therein shall be of a date not more than 16 months prior to such use . . .".

[13]15 USC §80a-24(e).

[14]17 CFR §230.429.

Thus, so long as a "current" prospectus is in effect the sale of previously registered, issued, and redeemed shares does not take on the characteristics of a new offering and potential investors have all of the material information needed upon which to base their judgment as to whether to buy the securities offered.

Accordingly, the Court of Claims' interpretation of section 6 is directly contrary to the legislative history against re-registration of shares, serves no useful purpose and as such is clearly erroneous and should be reviewed by this Court because of the impact it has upon petitioner and the whole of the mutual fund industry.

II. THE INTERPRETATION ACCORDED SECTION 6(b) IS SO ERRONEOUS, ARBITRARY AND CAPRICIOUS AND WITHOUT FOUNDATION THAT IT AMOUNTS TO A TAKING OF PETITIONER'S PROPERTY AND DENIES TO PETITIONER THE DUE PROCESS OF LAW

The SEC has taken petitioner's money — $9,833. It took this money when petitioner was forced, by virtue of the SEC's erroneous interpretation of Section 6(b) expressed in Release No. 33-5836, *supra,* to pay the fee to re-register previously registered, issued and redeemed shares.

Moreover, petitioner has been further denied due process of law and injured in its property because the court below wholly ignored the clear legislative history of Section 6(b) and instead accepted the SEC's interpretation of the statute which was kept secret and which was available only upon request and which has no force or effect because not published in accordance with the Administrative Procedure Act, 5 USC §551, *et seq.*

In *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906), this Court stated that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.* at 396.[15] For the reasons set forth in Part I, petitioner's payment of money to the SEC was wrongfully induced and it has therefore been injured in its property. More importantly, this injury has been inflicted without complying with petitioner's due process rights.

Petitioner has been denied due process because, although Section 6(b) on its face bears a reasonable relation to the legislative purpose, as interpreted and applied it is unreasonable, arbitrary and capricious and as such is unconstitutional. *Nebbia v. New York,* 291 U.S. 502, 510.

The Court of Claims based its decision primarily upon the SEC's "settled administrative interpreteation" of Section 6(b). It accorded that interpretation great deference, citing this Court's opinion in *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969). The basis for this deference, however, the SEC's "settled administrative interpretation", is so tenuous and so clearly wrong as to call for an exercise of this Court's power of supervision.

Initially, as set forth in Part I, the interpretation is plainly inconsistent with the Act's legislative history. Next, the Court below decided that the SEC's view with

[15]Although *Chattanooga* involved anticompetitive conduct and an application of the Clayton Act, the fundamental "property" concept involved there is equally applicable to Section 6(b) of the Act since petitioner's payment of double registration fees has been "wrongfully induced", as set forth, *supra.* See also *Reiter v. Sonotone Corp.,* 99 S.Ct. 2326 (1979).

respect to re-registration of redeemed shares constituted a "settled administrative interpretation". The fact is, however, that this "settled" interpretations is nothing more than an unwritten "view" that has apparently been held by certain members of the Commission's staff.[16] The court's conclusion, based on this scant evidence, that the SEC's view constituted a "settled administrative interpretation" is clearly erroneous and as such should be reviewed by this Court.

Finally, and most importantly, the court's reliance on a secret, unwritten and unpublished interpretation of Section 6(b) is proscribed by Sections 552(a)(1)(D) and 552(a)(1)(E) of the Administrative Procedure Act, *supra,* and in and of itself denies to petitioner due process of law.[17]

Since the SEC's interpretation of Section 6(b) affects the whole of the mutual fund industry it is plainly an "interpretation of general applicability". And because such interpretation has not been published or even set forth in written form, petitioner cannot, but has been, "adversely affected" thereby. See, *e.g., Morton v. Ruiz,*

[16]The only evidence in support of the "view" expressed by the Commission in Release No. 33-5836 is two affidavits executed by Commission employees (602 F2d at 336). One such affidavit states: "To my knowledge, during all the time I have been in the Division, *persons who requested* information concerning registration requirements applicable to previously registered and redeemed shares have been informed that such shares must be re-registered prior to resale to the public." *Id.* (emphasis supplied). Thus, the "view" was kept secret and supplied only upon request.

[17]Section 552(a)(1)(D) of the APA (5 USC §552(a)(1)(D), requires agencies to publish "statements of general policy or interpretations of general applicability" in the Federal Register. If such a policy or interpretation is not so published, a person without actual knowledge of it "may not in any manner . . . be adversely affected" by it. (5 USC §552(a)(1)(E).

415 U.S. 199 (1973). Petitioner submits that the failure of the court below even to consider the plain mandate of this statute, much less follow it, constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, petitioner requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

In the United States Court of Claims

No. 196–78

(Decided July 18, 1979)

FIRST MULTIFUND FOR DAILY INCOME, INC. v. THE UNITED STATES

Carl L. Shipley, attorney of record, for plaintiff. *Shipley, Smoak & Akerman*, of counsel.

Frank M. Rapoport, and *Myrna Siegel*, Securities and Exchange Commission, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant. *Jacob H. Stillman* and *William A. Dietch*, Securities and Exchange Commission, of counsel.

Before FRIEDMAN, *Chief Judge*, DAVIS and KASHIWA, *Judges*.

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

The question in this case, here on cross-motions for summary judgment, is whether an open-end registered investment company must file with the Securities and Exchange Commission a registration statement covering shares of its stock that (1) had been sold under a previously filed registration statement, (2) the company had redeemed upon tender by the shareholders, and (3) the company

seeks to sell again. We hold that such re-registration is required.

I.

A. The Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-52 (1976), was the product of congressional concern that the then existing federal securities laws "were inadequate to protect the purchasers of investment company securities." *United States* v. *Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 704 (1975); *see also E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 52-53 (1977). The statute gives the Commission "broad regulatory authority over the business practices of investment companies." *Nat'l Ass'n of Securities Dealers, supra*, 422 U.S. at 704-05 (footnote omitted). The Act in effect requires the registration of investment companies with the Commission pursuant to section 8 (15 U.S.C. § 80a-8) by prohibiting a wide variety of transactions by unregistered companies (section 7, 15 U.S.C. § 80a-7). Registered investment companies are required to register with the Commission under the Securities Act of 1933 their securities that they offer for public sale; the registration requirements under that Act have been modified in certain respects for investment companies. *See* section 24, 15 U.S.C. § 80a-24.

Section 6(a) of the Securities Act of 1933, 15 U.S.C. § 77f(a) (1976), provides for the registration of securities with the Commission, and section 6(b), 15 U.S.C. § 77f(b), imposes a filing fee based upon the aggregate offering price of the securities registered.

B. The plaintiff is registered with the Commission as an open-end, diversified management investment company. In colloquial terms, it is a mutual fund that sells its shares to and on demand redeems them from the public at a price based on a pro rata share of the net asset value of the fund. It is what is generally termed a "money market" fund, which invests in short-term debt securities. Like other open-end funds that redeem their securities on demand, plaintiff continuously sells and redeems its securities. As a money market fund, investors frequently use it as a short-term repository of funds.

From August 1974 to February 1977, the plaintiff filed with the Commission five registration statements covering a total of 1,650,000 shares. On March 17, 1978, plaintiff filed a registration statement covering 4,660,591 shares and paid a registration fee of $9,833.[1] Plaintiff asserts in its petition that this registration fee was "for re-registration of all previously registered, issued and redeemed shares."[2] Charging that the Commission's requirement that plaintiff pay the registration fee on those shares violates section 6(b) of the Securities Act of 1933 and constitutes a taking of plaintiff's property in violation of the fifth amendment, plaintiff has filed this suit to recover the $9,833 registration fee it paid.

II.

The defendant urges us not to decide the case but to transfer it to the district court. It argues that Congress intended that disputes over the meaning and applicability of the Securities Act of 1933 should be litigated in the district courts rather than in this court, and it suggests that transfer should be made under the doctrine of comity.

The defendant does not deny that we have jurisdiction over this claim under the Tucker Act, 28 U.S.C. § 1491

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[1] Rule 24f-2 under the Investment Company Act, 17 C.F.R. § 270.24f-2 (1978) permits a registered investment company to register an indefinite number of its shares by attaching to its registration statement a declaration to that effect and paying a $500 fee. The rule also requires the investment company in the following years to pay the regular registration fee for the shares it sold during the past fiscal year pursuant to the declaration. Five hundred dollars of the total fee of $9,833 that the plaintiff paid in 1978 covered such a declaration.

[2] The difference between the 1,650,000 shares previously registered and the plaintiff's claim that all of the 4,660,591 shares registered in 1978 had been "previously registered, issued and redeemed" apparently stems from plaintiff's theory that it had registered an additional 3,016,591 shares by filing post-effective amendments to its registration statements (see *infra* pp. 8-9) that covered the additional shares. Unlike a registration statement, which automatically becomes effective 20 days after filing or amendment unless the Commission affirmatively stays its effectiveness (section 8(a) of the Securities Act of 1933, 15 U.S.C. § 77h), a post-effective amendment to a registration statement filed by a registered investment company becomes effective only after the Commission declares it to be so (section 8(c), Securities Act of 1933, 15 U.S.C. § 77h(c); section 24, Investment Company Act of 1940, 15 U.S.C. § 80a-24(a), (e). *See* Securities Act, Rule 427(b), 17 C.F.R. § 230.427(b) (1978)). The Commission never declared plaintiff's post-effective amendments to be effective.

(1976), as a "claim against the United States founded . . . upon the Constitution or any Act of Congress." We know of no authority, and the defendant has called none to our attention, upon which we can transfer to another court a case over which we have jurisdiction. The only statute dealing with our authority to transfer cases is 28 U.S.C. § 1506 (1976), which directs us to transfer to an appropriate district court "a case within the exclusive jurisdiction of the district courts [that] is filed in the Court of Claims."

Since our jurisdiction was properly invoked in this case, we have an obligation to exercise it and decide the case. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 39–40 (1909); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 496–97 (1971). *See Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800, 817–18 (1976).

III.

A. 1. Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, prohibits, with exceptions not here applicable (sections 3 and 4, 15 U.S.C. §§ 77c and d), "any person" from selling in interstate or foreign commerce or through the mails any security "[u]nless a registration statement is in effect" for that security. This broad provision covers the sale of securities by a registered investment company, as Congress recognized when it provided in section 24 of the Investment Company Act that "[i]n registering under the Securities Act of 1933, any security of which it is the issuer, a registered investment company" may deviate from certain of the requirements under the latter Act. Except as thus modified, the standards governing the registration of securities by a registered investment company under section 6 of the Securities Act of 1933 are the same that apply to securities generally.

The last sentence of section 6(a) provides: "A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered." Section 6(b) requires the payment of a registration fee of 1/50th of one percent "of the maximum aggregate price at which such securities are proposed to be offered." Read

together, these two provisions indicate that the registration statement covers and the registration fee is based upon only the specific securities proposed to be offered at that time—*i.e.*, the initial distribution—and does not cover a subsequent distribution or a resale of the securities by the issuer after it has repurchased or redeemed them. The "maximum aggregate price at which such securities are proposed to be offered" refers to the initial distribution and does not cover a subsequent re-offer of redeemed shares, which necessarily would exceed the "maximum aggregate price" of the initial offer.

Since 1938, the Commission has interpreted the last sentence of section 6(a) as permitting a registration statement to cover only shares "presently intended to be offered." *In re United Combustion Corp.*, 3 S.E.C. 1062, 1063 (1938); *in re Shawnee Chiles Syndicate*, 10 S.E.C. 109, 113–14 (1941). As the Commission explained in the latter case (10 S.E.C. at 113), "The policy behind the last sentence of Section 6(a) is to assure investors that the registration statements and prospectuses on which they rely, so far as is reasonably possible, provide current information."

It is a reasonable corollary of this rule that a registration statement of a mutual fund may cover only the issuer's initial offering of the securities registered and not its re-offering of those securities after the issuer has redeemed them. The policy underlying the last sentence of section 6(a) of assuring investors that the registration statement and prospectus provide current information is no less served by requiring re-registration of investment company shares previously registered and then redeemed than by the requirement that a registration statement may cover only shares intended to be currently offered. In each instance, the statutory objective of providing full disclosure to investors is served by requiring a new filing when the shares are offered subsequently.

2. The Commission and its staff for many years have interpreted section 6(a) as requiring re-registration of investment company shares that are redeemed or repurchased and then publicly resold. An affidavit of the chief counsel since 1954 of the Commission's Division of Corpora-

tion Finance, which from 1940–64 handled the registration of mutual fund shares, stated that the Division staff had advised registrants that redeemed or repurchased shares "must be re-registered prior to public resale."[3] An affidavit of the Director of the Commission's Division of Investment Management stated that since 1964 the staffs of the three different Commission divisions that at different periods were responsible for registration of investment company shares had given the same advice to registrants.

In 1977 the Commission amended its rules to permit an alternative method for determining the fee under section 6(b) for registering investment company shares. In its notice of proposed rule-making, the Commission stated that it

> has consistently taken the view that, absent an available exemption, all securities offered or sold by an issuer are subject to the registration requirements of the 1933 Act, notwithstanding the fact that such securities may have been redeemed or repurchased by the issuer subsequent to their earlier sale by the issuer pursuant to a registration statement.

42 Fed. Reg. 15923 (1977).

Since the registration fee is calculated upon the total amount of securities being registered, the Commission's settled view might result in "inordinately high registration costs for open-end management companies and their shareholders." The Commission therefore permitted those investment companies to pay a registration fee that covers only the number of shares being registered that exceeded the number redeemed or repurchased in the previous fiscal year. *Id.*; 42 Fed. Reg. 31782 (1977), *as amended by* 42 Fed. Reg. 58403 (1977) (codified in 17 C.F.R. § 270.24e–2).

In deciding this question we are "guided by the 'venerable principle that the construction of a statute by those

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[3] There was attached to the affidavit a 1958 letter from a former chief counsel of the Division, who referred to a 1948 letter from the Director of the Division stating that the Division would not object to the offering of redeemed shares under the original registration statement. The 1958 letter stated that the Division had reconsidered the question and had concluded that an investment company's "registration statement is 'effective only as to shares originally offered and sold pursuant thereto and that such shares may not be reoffered and sold under the same registration statement."

charged with its execution should be followed unless there are compelling indications that it is wrong . . . .' *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)." *E. I. duPont de Nemours & Co.* v. *Collins, supra*, 432 U.S. at 54–55. The Supreme Court applied that principle in that case in upholding the Commission's interpretation of another provision of the Investment Company Act. *See also Nat'l Ass'n of Securities Dealers, supra*, where the Court relied, among other things, upon an opinion of the Commission's general counsel and a staff report as showing a "consistent and long-standing interpretation by the agency charged with administration of the [Investment Company] Act" which was "entitled to considerable weight." 422 U.S. at 717, 718, 719.

B. Plaintiff offers four reasons for rejecting both this meaning of the language of the Act and the Commission's settled interpretation of it.

1. Plaintiff argues that the Commission's interpretation of the statute is not entitled to weight because it has not been promulgated as a rule or as an interpretation of a rule and was not made public officially prior to the Commission's notice of proposed rule-making in 1977. The form in which an agency manifests its interpretation of a statute it administers is immaterial; the critical thing is whether there is such an interpretation and how settled it has become. As noted, the Supreme Court has referred to staff views as reflecting a settled Commission interpretation. The Supreme Court has relied upon an agency's contemporaneous construction "even though it was applied in cases settled by consent rather than in litigation." *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959).

2. Plaintiff next urges that because under the law of New York, the state of its incorporation, redeemed shares are treasury stock and remain "issued," the shares need not be re-registered when they are resold. However New York may characterize redeemed shares for state law purposes, that characterization does not control the treatment of those shares under the registration requirements of the Securities Act of 1933, which is a federal statute providing its own standards. *Cf. SEC* v. *Variable Annuity*

Life Ins. Co. of America, 359 U.S. 65, 69 (1959); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 352 (1943); *Capital Funds, Inc.* v. *SEC*, 348 F.2d 582 (8th Cir. 1965).

3. Plaintiff contends that investors will be fully protected even if redeemed shares are not re-registered prior to sale. Evaluation of this argument requires a brief description of certain statutory provisions not hitherto discussed.

The basic purpose of the Securities Act of 1933 was to provide investors with full disclosure of pertinent information relating to the issuers of securities and the securities themselves. *See, e.g.*, *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124 (1953); *A. C. Frost & Co.* v. *Coeur d'Alene Mines Corp.*, 312 U.S. 38, 40 (1941). This is accomplished primarily through the requirements (i) that securities may be publicly offered and sold only pursuant to an effective registration statement filed with the Commission, and (ii) that a prospectus containing most of the information in a registration statement must be furnished to purchasers prior to or contemporaneously with the sale or delivery of securities. Sections 5(a), (b), 10, 15 U.S.C. §§ 77e(a), (b), 77j.

The requirement of full disclosure is strengthened by the statutory provisions imposing civil liability upon various persons connected with the distribution of securities for material misstatements or omissions in a registration statement. Section 11 (15 U.S.C. § 77k) imposes such liability upon a broad group of persons.[4] To prevail, the plaintiff must prove only the material misstatement or omission and need not prove fraud. Section 13 of the Act (15 U.S.C. § 77m) provides a one-year statute of limitations in suits under section 11, which runs from the discovery of the misstatement or omission; there is the further limitation that the suit must be filed within 3 years of the first offering of the security to the public or the date of sale of the security.

Section 24(e) of the Investment Company Act permits an investment company to register additional shares of its

[4] A purchaser of securities may sue every person who signed the registration statement, every director or partner of the issuer, every expert named with his consent in the registration statement, and every underwriter.

stock by filing an amendment to its current registration statement (known as a "post-effective amendment"), instead of filing a new registration statement. That section further provides that, for purposes of section 11 of the Securities Act, the effective date of the post-effective amendment is deemed to be the effective date of the registration statement it amends; and that the 3-year limitation period in section 13 of the Securities Act runs from the effective date of the amendment.

The plaintiff contends that requiring it to re-register the redeemed shares would not provide investors with any additional protection. It states that when it sells redeemed shares, every purchaser is given a current prospectus which contains almost all information in the registration statement; and that because of section 24(e), investors would have the same limitations period within which to file a suit under section 11 of the Securities Act if the redeemed shares are covered by a post-effective amendment that they would have if the shares were re-registered.

The limitations issue is not as clear as plaintiff suggests. Although the 3-year limitations period begins to run on the effective date of a post-effective amendment, it is uncertain whether the filing of a post-effective amendment extends the period for claims based upon misstatements or omissions in the original registration statement, not repeated in the post-effective amendment but which presumably would be repeated in a new registration statement. Counsel for the Commission stated at oral argument that the limitations period would be so extended; counsel for plaintiff apparently took the contrary position. As far as we know, there has not been any decision on the point. Furthermore, it also is unclear what the effect of a post-effective amendment would be upon the one-year statute of limitations.

We cannot say with real assurance that the absence of re-registration before a registered investment company may sell redeemed shares would have no adverse impact upon the protection that Congress intended to give investors in mutual funds through the registration requirements and civil liability provisions of the Securities Act of

1933. We are unwilling to read the language of section 6 of the Act restrictively and to reject the Commission's settled administrative interpretation of it because of the conjectural conclusion that re-registration is unnecessary to protect mutual fund investors.

4. Plaintiff complains that it should not be required to pay the double registration fee that results when it re-registers redeemed securities that it previously had registered. The additional fee, however, is paid upon the resale of those shares, not upon the original distribution. Moreover, plaintiff's burden, to an undetermined but presumably significant extent, is of its own doing. When plaintiff registered the 4,660,591 shares in 1978, it could instead have utilized the post-effective amendment procedure instituted in 1977 and received a credit for those shares that it had redeemed in the previous fiscal year. Instead, it elected to register and pay the fee for the entire issue.[5]

CONCLUSION

Plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the petition is dismissed.

---

[5] Plaintiff does not contend that the amount of the fee itself is unreasonable, and this modest fee of 1/50th of one percent, which has been in the statute since 1933, could not be successfully challenged on that ground. In view of our conclusion that section 6 of the Securities Act requires the re-registration of, and payment of a registration fee for, redeemed shares that are to be resold to the public, there is no substance to plaintiff's contention that its payment of that fee constitutes a taking of its property by the government. *See Knox* v. *Lee*, 79 U.S. (12 Wall.) 457, 551–52 (1870); *Bowles* v. *Willingham*, 321 U.S. 503, 516–18 (1944); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592–94 (1962).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 196-78

FIRST MULTIFUND FOR DAILY INCOME, INC.

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge,* DAVIS AND KASHIWA, *Judges.*

ORDER

This case comes before the court on plaintiff's motion, filed August 1, 1979, for rehearing pursuant to Rule 151, with reference to the decision entered herein on July 18, 1979. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing is denied.

BY THE COURT

/s/ Daniel M. Friedman
Daniel M. Friedman
Chief Judge

APPENDIX C

STATUTES

Section 6a § 77f. Registration of securities and signing of registration statement

(a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this subchapter. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one-fiftieth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than $100.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b) of this section.

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

May 27, 1933, ch. 38, Title I, § 6, 48 Stat. 78; Oct. 22, 1965, Pub.L. 89-289, § 1, 79 Stat. 1051.

Historical Note

Codification. The original of this section contained a subsec. (e) which provided that no registration statement should be filed within the first 40 days following May 27, 1933.

* * * * *

Section 24 § 80a—24. Registration of securities under Securities Act of 1933

(a) In registering under the Securities Act of 1933, any security of which it is the issuer, a registered investment company, in lieu of furnishing a registration statement containing the information and documents specified in schedule A of section 77aa of this title, may file a registration statement containing the following information and documents:

(1) such copies of the registration statement filed by such company under this subchapter, and of such reports filed by such company pursuant to section 80a-29 of this title or such copies of portions of such registration statement and reports, as the Commission shall designate by rules and regulations; and

(2) such additional information and documents (including a prospectus) as the Commission shall prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors.

(e)(1) A registration statement under the Securities Act of 1933 relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company or unit investment trust may be amended after its effective date so as to incresae the securities specified therein as proposed to be offered. At the time of filing such amendment there shall be paid to the Commission a fee, calculated in the manner specified in section 77f(b) of this title, with respect to the additional securities therein proposed to be offered.

* * * * *

(f) In the case of securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investement trust, which are sold in an amount in excess of the number of securities included in an effective registration statement of any such company, such company may, in accordance with such rules and regulations as the Commission shall adopt as it deems necessary or appropriate in the public interest or for the protection of investors, elect to have the registration of such securities deemed effective as of the time of their sale, upon payment to the Commission, within six months after any such sale, of a registration fee of three times the amount of the fee which would have otherwise been applicable to such securities. Upon any such election and payment, the registration statement of such company shall be considered to have been in effect with respect to such shares. The Commission may also adopt rule and regulations as it deems necessary or appropriate in the public interest or for the protection of investors to permit the registration of an indefinite number of the securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investment trust.

Aug. 22, 1940, c. 686, Title I, § 24, 54 Stat. 825; Aug. 10, 1954, c. 667, Title IV, §§ 402, 403, 68 Stat. 689; Dec. 14, 1970, Pub.L. 91-517, § 13, 84 Stat. 1423.

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public –

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions:

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informatl procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this

paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of Federal Register.

APPENDIX D

[Release No. 33-5836, IC-9819; File No. S7-683]

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

Computation of Filing Fee for Securities Registered by Open-End Investment Companies and Unit Investment Trusts.

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: This rule provides an optional method for calculation of registration fees by open-end investment companies and unit investment trusts. It has the effect of requiring registration fees for only those shares or units registered in excess of the number redeemed or repurchased in the previous fiscal year.

EFFECTIVE DATE: June 27, 1977.

FOR FURTHER INFORMATION CONTACT:

Anthony A. Vertuno, Division of Investments Management, Securities and Exchange Commission, Washington, D.C. 20549, 202-755-1192.

SUPPLEMENTARY INFORMATION: On March 15, 1977, the Commission published proposed Rule 24e-2 under the Investment Company Act of 1940 (17 CFR 270.24e-2) for comment (Release 33-5817, IC-9677, 42 FR 15922, March 24, 1977) to permit certain investment companies registering additional securities pursuant to Section 24(e)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(e)(1)) to include in the computation of the filing fee a credit for securities redeemed or

repurchased during the preceding fiscal year. The proposed rule has been revised to reflect certain comments received during the comment period ended April 20, 1977, and is being adopted, effective June 27, 1977.

Section 24(e)(1) of the Investment Company Act of 1940 ("1940 Act"), which permits registration of additional shares by post-effective amendment, provides for the payment of a filing fee calculated in the manner specified in Section 6(b) of the Securities Act of 1933 (U.S.C. 77a et seq., 77f(b)) ("1933 Act"). Rule 24e-2 was proposed pursuant to the broad authority of the Commission under Section 6(c) of the 1940 Act (15 U.S.C. 80a-6(c)) to, by rule "* * * exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title * * *" and adoption of the rule is based on the Commission's determination that relief from the payment of certain registration fees imposed by Section 24(e) of the 1940 Act "* * * is necessary or appropriate in the public interest and consistent with the protection of investors."

Comments Received

Thirty-four letters of comment were received on the proposed rule, with all but two commentators favoring its early adoption. The two commentators oppose the adoption of the rule as inappropriate and unnecessary because they disagree with the Commission's view that, absent the rule, a fee is required. Some of the other commentators, while supporting adoption of the rule, suggested its revision or expansion, and such comments fell into three broad categories:

(1) That the language of the rule be clarified in certain respects;

(2) That the rule be revised to permit its use by unit investment trusts as well as by open-end management investment companies; and

(3) That the method of computing the credit be modified.

Authority for the Rule

Two commentators have questioned the authority of the Commission to adopt the rule; they argue that shares that have been registered, sold and redeemed need not be registered in order to be offered again. The Commission's view is that, absent an available exemption, all securities offered or sold by an issuer are subject to the registration requirements of the 1933 Act, notwithstanding the fact that such securities may have been redeemed or repurchased by the issuer subsequent to their earlier sale pursuant to a registration statement. Thus, securities once registered and sold by an issuer may not be reacquired by the issuer through redemption or repurchase and resold in a public offering without reregistration because the disclosure and reporting requirements applicable to redeemed or repurchased shares do not provide adequate protection for investors. The Commission's long-standing position is consistent with the legislative history of the 1933 Act. The legislative history shows that all distributions of securities were intended to be covered by the provisions of the 1933 Act unless a specific exemption applied.[1] Moreover, except

[1]"The power [of the Commission to exempt securites] is deemed necessary for the effective administration of the bill, but is expected to be used only in a sparing manner, which keeps in mind the prima facie requirement that every security and transaction not specifically exempted by the terms of the bill should be kept within it." H.R. Rep. No. 85, 73rd Cong. 1st Sess. 6-7 (1933).

for the Section 4(2) exemption for non-public offerings, the transactional exemptions provided by Section 4 of the 1933 Act (15 U.S.C. 77d) expressly exclude offerings made by an issuer.

The public distribution of shares — "whether redeemed or newly issued — is thus the type of issuer transaction which requiree registration absent an available exemption.[2] The fact those shares may be deemed to be the "same" shares which have been registered prior to previous public sale does not negate the fact that after redemption, the subsequent resale involves a public offering by the issuer and, thus, falls squarely within the distributive framework the 1933 Act was intended to cover.

Although one of the two commentators opposing the adoption of the rule suggested that the Commission hold a public hearing to consider the constitutional and statutory aspects of the proposed rule, the questions raised by these commentators have been considered by the Commission, and they bring to light no new evidence or arguments which would warrant the Commission's reconsideration of these issues. Therefore no hearing is considered to be required in connection with the adoption of this rule.

Revision of the Proposed Rule

As noted above, some commentators urging adoption of the rule have also recommended revision or expansion of its scope.

[2]"[I]t [the Securities Act of 1933] does not affect the oridnary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering." Id. p. 5.

a. *Clarification of language of the rule.* Several language changes have been made in the rule to reflect the concerns of commentators. In addition, to assure that issuers filing post-effective amendments registering additional securities pursuant to Section 24(e)(1) correctly obtain and report the redemptions and repurchases establishing the basis for the credit provided by the rule, the text of the rule has been revised to establish a procedure for providing this information.

b. *Inclusion of unit investment trusts.* Several commentators urged that the credit provided be available to reduce registration fees payable by certain unit investment trusts issuing redeemable securities. The commentators' view is that such treatment is necessary on equitable grounds. They argue that failing to include unit investment trusts as well as open-end management companies within the rule would create a competitive disadvantage for unit investment trusts, and "Commission filing fee policy ought not to favor one type [of investment company] over another."

The Commission has considered these comments and agrees that such a revision is both equitable and appropriate, and the rule has been revised to provide similar treatment to both open-end management companies and unit investment trusts. The registration provisions of Section 24(e)(1) of the 1940 Act extend to unit investment trusts as well as to open-end management companies. Republication of the proposed rule to solicit comment on this revision is not required because the revision extends the benefits of the rule, and because the concept has clearly received the attention of commentators. Since republication for comment would delay the benefit of the rule to all registrants or would cause the

inequitable delay of relief to certain registrants, such resolicitation would be adverse to the public interest.

c. *Modification of fee credit computation.* Finally, a number of commentators suggested that the availability of the filing fee credit provided by the proposed rule be modified. Alternatives suggested include (1) permitting the credit to be utilized during the fiscal year in which a redemption or repurchase occurs (including the fiscal year in which the offering commences); (2) permitting the credit to be utilized in a fiscal year later than the next fiscal year after such redemption or repurchase occurs; or (3) permitting the credit to be carried indefinitely by providing that a fee should be paid only when the aggregate number of shares registered is increased to an amount in excess of the highest previous total number of shares as to which a filing fee has been paid.

These alternatives have not been adopted. Each would lead to greater difficulty in monitoring compliance with the rule. The first alternative could also tend to induce the initial and periodic registration of smaller numbers of shares in an attempt to "realize" an earlier use of the proposed credit. Aside from the increased risk of inadvertent oversales, this would tend to increase the number of filings under Section 24(e)(1) with a concomitant increase in expenses to both registrants and the Commission. The second alternative is an unnecessary provision, since a company with a material net redemption credit at the end of a fiscal year can avoid the "loss" of the credit (due to a successive net redemption fiscal year) by making a single filing pursuant to the rule during that second fiscal year, registering the full amount of securities which would be covered by the minimum filing fee plus the available credit. Such registered shares would thereafter be available in the company's "inventory" for use during years in which

positive net sales occurred. The third alternative would provide retroactive relief affecting registration fees paid in connection with completed registrations of securities, which is beyond the relief contemplated by the proposed rule, and for which we see no justification.

In addition, one commentator suggested that "money market" funds "should be required to pay a registration fee quarterly based on the net sales of the Fund during the preceding quarter." This approach, it is suggested, would allow the fund properly to "accrue and match" expenses of a period with income earned during that period. This change is not adopted, however, because such "matching" of filing fees with the benefit derived can be satisfactorily achieved through proper accounting procedures which provide for accrual and expensing of the costs of share registration. Also, this revision would impose on issuers and the Commission the added expense of more frequent filings.

It was also suggested that proposed Rule 24e-2 be reconciled with proposed Rule 24f-2 under the 1940 Act (17 CFR 270.24f-2), (which provides for the registration of an indefinite number or amount of securities and the payment of a single fee after the close of the fiscal year).[3] The reconciliation would allow filings pursuant to Rule 24e-2 to be made as desired during a fiscal year, and would require an aggregate annual payment with a single credit (based on the net redemptions during that year) to be made once for each such completed year. We believe that an incorporation of the fee credite concept with the concept of indefinite share registration, if determined to be desirable, could be more appropriately implemented through a revision of proposed Rule 24f-2, which is still under consideration.

[3]Release No. 33-5724, IC-9347, File No. S7-644; published July 8, 1976 (41 FR 32760, August 5, 1976).

CONCLUSION

In consideration of the foregoing, Chapter II of Title 17 of the Code of Federal Regulations is hereby amended by the addition of § 2.70.24e-2 as set forth below.

§ 270.24e-2 Computation of fee.

Where a registration statement under the Securities Act of 1933 relating to the securities of an open-end management company or unit investment trust issuing redeemable securities is amended pursuant to section 24(e)(1) so as to increase the amount of securities proposed to be offered thereby,

(a) The fee to be paid at the time of filing of such amendment.

(1) Shall be calculated in the manner specified in Section 6(b) of the Securities Act of 1933 except that, for the purpose of such calculation, the maximum aggregate price at which the securities are proposed to be offered may be deemed to be the maximum aggregate offering price, as determined by Rule 457(c) [17 CFR 230.457(c)] under the Securities Act of 1933, of: (i) the amount of securities (number of share or other units) being registered reduced by (ii) the amount of securities (number of shares or other units) of the same class redeemed or repurchased by the issuer in its previous fiscal year provided that, when more than one such amendment is filed by an issuer in any one fiscal year, the total amount of securities used for such reductions during any fiscal year in which such reductions are made may not exceed the total amount of securities which were redeemed or repurchased by the issuer during its previous fiscal year,

(2) Shall in no case be less than $100, and

(b) A registrant electing to calculate a filing fee in the manner described in paragraph (a) of this section shall in-

dicate, on the facing sheet of the post-effective amendment, in a footnote to the maximum aggregate offering price shown in the registration fee calculation table:

(1) That the calculation of the maximum aggregate offering price is made pursuant to this section;

(2) The total amount of securities redeemed or repurchased during the previous fiscal year;

(3) The total amount of redeemed or repurchased securities used for reductions pursuant to paragraph (a) of this section in all previous filings of post-effective amendments during the current fiscal year; and

(4) The amount of redeemed or repurchased securities being used for such reduction in the amendment being filed.

* * * * *

(Sec. 6(c). Investment Company Act of 1940) (15 US.C. 80a-6(c).)

This rule shall be effective June 27, 1977.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

JUNE 16, 1977.

[FR Doc.77-17768 Filed 6-22-77; 8:45 am]

Supreme Court, U.S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1006

In the Supreme Court of the United States

OCTOBER TERM, 1979

FIRST MULTIFUND FOR DAILY INCOME, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-10a) is reported at 602 F. 2d 332.

JURISDICTION

The judgment of the Court of Claims was entered on July 18, 1979. A petition for rehearing was denied on September 28, 1979 (Pet. App. 11a). The petition for a writ of certiorari was filed on December 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether re-registration of an open-end investment company's shares is required under the Securities Act of 1933 when the shares are redeemed and later resold to public investors.

STATUTE INVOLVED

Section 6 of the Securities Act of 1933, 15 U.S.C. 77f, provides in pertinent part:

> (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement * * *. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.
>
> (b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one-fiftieth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than $100.

STATEMENT

1. Petitioner is registered with the Securities and Exchange Commission under the Investment Company Act of 1940 as an open-end diversified management investment company, commonly known as a mutual fund. By definition, "open-end" investment companies offer for sale securities that are redeemable at the option of the holder.[1] Typically, these companies continuously issue and redeem shares and periodically register additional shares for sale to the public under the Securities Act of 1933. The Securities and Exchange Commission has interpreted Section 6(a) of the Securities Act, 15 U.S.C. 77f(a), to require re-registration of shares that have been redeemed or repurchased by an investment company prior to public resale.

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[1]See Section 2(a)(32) of the Investment Company Act, 15 U.S.C. 80a-2(a)(32).

In order to accomodate open-end investment companies in the periodic registration of additional shares, the Investment Company Act provides a means by which these companies can register additional shares under the Securities Act by amendment of a current registration statement (a "post-effective" amendment) rather than by means of a new registration statement.[2] A substantial portion of the securities registered pursuant to post-effective amendments by open-end investment companies consists of shares that previously have been redeemed or repurchased. Because the ordinary method of fee calculation for registering such securities[3] could result in unduly high registration costs, the Commission proposed and adopted in 1977 an optional, less expensive, method of fee calculation for shares registered by post-effective amendment.[4] In essence, the new method of calculation requires the payment of fees only for those shares registered in excess of the number of shares redeemed or repurchased in the previous fiscal year.[5]

2. Prior to March 1978, petitioner had registered 1,650,000 of its shares under the Securities Act. In March 1978, it registered a total of 4,660,591 shares and

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[2]See Section 24(e)(1) of the Investment Company Act, 15 U.S.C. 80a-24(e)(1).

[3]See Section 6(b) of the Securities Act, 15 U.S.C. 77f(b), and Section 24(e)(1) of the Investment Company Act, 15 U.S.C. 80a-24(e)(1).

[4]See Rule 24e-2 under the Investment Company Act, 17 C.F.R. 270.24e-2

[5]See Securities Act Release No. 5817, 42 Fed. Reg. 15922 (1977); Securities Act Release No. 5836, 42 Fed. Reg. 31781 (1977) (Pet. App. 18a-26a).

paid a registration fee of $9,833.[6] Petitioner chose to register those shares by means of a new registration statement rather than a post-effective amendment. In May 1978, petitioner filed suit in the Court of Claims seeking to recover the $9,833 registration fee, claiming that the fee was paid for re-registration of previously registered shares[7] and that the fee violated Section 6(b) of the Securities Act and constituted a taking of petitioner's property in violation of the Fifth Amendment (Pet. App. 3a).

The Court of Claims granted summary judgment against petitioner, holding that re-registration of shares issued by an open-end investment company is required when previously registered shares are redeemed and subsequently resold (Pet. App. 1a-2a). The court concluded that the plain language of Section 6 of the Act supported the long-standing administrative interpretation

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[6]This fee included $500 for the filing of a "declaration" that enabled petitioner to register an indefinite number of shares for sale in the future (see Pet. App. 3a n.1). The filing of a declaration permits a company to sell any number of shares during a given year, provided that within six months after the close of the fiscal year in which the declaration is in effect the company files a notice listing the exact number of shares sold. A registration fee is then calculated on the basis of the aggregate sale price of shares sold, reduced by the aggregate redemption or repurchase price of securities redeemed or repurchased by the issuer during the previous fiscal year. See Rule 24f-2 under the Investment Company Act, 17 C.F.R. 270.24f-2; Securities Act Release No. 5881, 42 Fed. Reg. 58400 (1977).

[7]Petitioner's claim that all 4,660,591 shares had previously been registered is based on the registration of 1,650,000 shares pursuant to five registration statements filed between August 1974 and February 1977 and the purported additional registration of 3,010,591 shares pursuant to certain post-effective amendments to its registration statements. However, such post-effective amendments do not become effective unless so declared by the Commission. See Section 8(c) of the Securities Act, 15 U.S.C. 77h(c). The Commission never declared petitioner's post-effective amendments to be effective (Pet. App. 3a & n.2).

that a registration statement and accompanying registration fee cover only the specific securities proposed to be offered in an initial distribution and do not cover a subsequent distribution or resale by the issuer after it has redeemed the securities (*id.* at 4a-5a).

In reaching this conclusion, the court noted that the Commission's interpretation of Section 6 does not require the payment of a double registration fee because the payment of an additional fee is required only when shares are resold (Pet. App. 10a). The court also observed that the financial burden on petitioner was at least partially the result of its own actions, because it failed to utilize the post-effective amendment procedures adopted by the Commission in 1977 that would have provided a credit for shares that it had redeemed in the previous fiscal year (*ibid.*).

ARGUMENT

The decision of the Court of Claims, on which we generally rely, is correct and does not conflict with any decision of this Court or any other court. Further review by this Court is not warranted.

1. In granting summary judgment against petitioner, the Court of Claims approved the Commission's long-standing interpretation of Section 6(a) of the Securities Act. The last sentence of Section 6(a) provides that "[a] registration statement shall be deemed effective *only as to the securities specified therein as proposed to be offered*" (emphasis supplied). Since 1938, the Commission has construed this provision to mean that registration statements are effective only as to the shares that the issuer presently intends to offer for sale. See *In the Matter of United Combustion Corp.*, 3 S.E.C. 1062, 1063 (1938); *In the Matter of Shawnee Chiles Syndicate*,

10 S.E.C. 109, 113-114 (1941); see also *Resources Corporation International* v. *SEC*, 103 F. 2d 929, 932 (D.C. Cir. 1939). As the Commission has noted, "[t]he policy of * * * Section 6(a) is to assure investors that the registration statements and prospectuses on which they rely, so far as is reasonably possible, provide current information." *In the Matter of Shawnee Chiles Syndicate*, *supra*, 10 S.E.C. at 113. Congress acknowledged the correctness of this interpretation when the securities laws were subsequently amended.[8]

The Commission has consistently applied this prohibition against registration of securities long before sale ("shelf registration") by requiring re-registration of investment company shares that have been redeemed or repurchased and are offered for resale. Affidavits of Commission staff members submitted to the Court of Claims established that this requirement has been imposed since at least 1954 (Pet. App. 5a-6a).

Petitioner nonetheless contends (Pet. 9) that the Commission's interpretation requiring re-registration of redeemed shares "was kept secret and * * * was available only upon request." There is no basis for this assertion. Petitioner cites no evidence that investment companies were unaware of or have not generally complied with the re-registration requirement. Moreover, the Commission's

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[8]When the securities laws were amended in 1954, the Senate Committee approved the Commission's interpretation:

> Section 6(a) of the Securities Act, which provides that securities may be registered by filing a registration statement, permits the registration only of securities proposed to be offered, *i.e.*, the number of shares or units expected and intended to be offered and sold in the proximate future. It does not permit "registration for the shelf."

S. Rep. No. 1036, 83d Cong., 2d Sess. 10 (1954).

1977 release published in the Federal Register (see page 3, *supra*), which proposed an alternative method for computing registration fees paid by investment companies, specifically described the long-standing re-registration requirement. Thirty-two of the thirty-four letters of comment received by the Commission favored the adoption of this proposal (Pet. App. 19a-20a). None of the thirty-two commentators claimed surprise or disagreed with the Commission's re-registration interpretation.

2. Petitioner also argues (Pet. 6-7) that the re-registration requirement conflicts with relevant legislative history and is arbitrary and capricious. These contentions rest on a single statement included in a congressional committee report (Pet. 7) and petitioner's assertion that the re-registration requirement "serves no useful purpose" (Pet. 8).

a. The committee report that petitioner relies on merely observes that:

> [The Securities Act of 1933] does not affect the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.

H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933). This passage refers to securities issued by ordinary corporate issuers, not investment companies that are continuously engaged in the redemption and redistribution of their shares. Moreover, rather than supporting petitioner's position, the quoted passage shows that Congress viewed a redistribution of securities, even by persons other than the issuer, as functionally identical to a new offering when those persons "control" the issuer. A fortiori, re-registration is required when the shares are offered for

resale by the issuer itself. This Court implicitly recognized the character of investment company shares that are redeemed and resold when, in a description of the operation of mutual funds, it noted that "[i]n order to avoid liquidation through redemption, mutual funds continuously issue and sell *new* shares." *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 698 (1975) (emphasis supplied).[9]

b. Petitioner also argues that "re-registration serves no useful purpose" (Pet. 8) and that Section 6(a) therefore should not be deemed to require re-registration.

However, the Securities Act's re-registration requirement applies to all issuers subject to the Act, including investment companies. It assures that each investor purchasing shares in a distribution receives material information about the issuer and is afforded protection against misstatements in the registration statement. Section 11 of the Securities Act, 15 U.S.C. 77k, provides for civil liability for material misstatements in, or omissions from, a registration statement.[10] That liability expires three years after the date the security is first *bona fide* offered to the public (Section 13 of the Securities Act, 15 U.S.C. 77m), and rests on the deceptive nature of statements or omissions at the time when the registration statement becomes effective. Thus, allowing

[9]Petitioner claims that its sales and purchases occurred in the *secondary* market. But, as this Court has stated, "[t]he distribution-redemption system constitutes the primary market in mutual-fund shares." *United States* v. *National Association of Securities Dealers*, *supra*, 422 U.S. at 699. Secondary market transactions are "between dealers, from an investor to a dealer, and between investors through brokered transactions." *Id.* at 700.

[10]Section 11 was intended to assure that registration statements would be carefully and accurately prepared. See Douglas & Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 173 (1933).

issuers to register securities long before they are sold, or to re-acquire their own securities and then resell them without re-registration, would undermine the protections provided by Section 11. Some investors might purchase shares resold by the issuer after the three-year limitations period had run. Moreover, even if the purchases were made within three years, the investors would have no remedy under Section 11 if the registration statement was correct when it became effective but became false or misleading through the passage of time.

It is true that Section 24(e) of the Investment Company Act, 15 U.S.C. 80a-24(e), requires open-end investment companies to file updated prospectuses as post-effective amendments to their registration statement[11] and provides that the effective date of such a registration statement shall be the effective date of the amendment.[12] Furthermore, Section 24(e) provides that the three-year limitations period in Section 13 of the Securities Act commences to run on the effective date of the amendment. Thus, as to a limited category of issuers, including open-end investment companies, the re-registration requirement may not be necessary in order to afford investors the protections of Section 11 of the Securities Act. However, petitioner's contention that shares once registered are always registered cannot logically be confined to investment companies. Petitioner's contention depends on an interpretation of Section 6(a) of the Securities Act and thus would apply to issuers generally. The Commission was not obligated

[11]Prospectuses must be updated if they are distributed more than nine months after the effective date of the registration statement. See Section 10(a)(3) of the Securities Act, 15 U.S.C. 77j(a)(3).

[12]Section 24(e), which is contained in the Investment Company Act, does not apply to issuers other than investment companies.

to attempt to construe the Securities Act to exempt investment companies from the general requirements of Section 6(a) simply because additional safeguards have been provided to investors under the Investment Company Act, particularly in view of the steps that it has taken to mitigate the economic burdens associated with the re-registration of investment company shares (see page 3, *supra*).

c. The Commission's interpretation of Section 6(a), which applies to all categories of issuers including investment companies, agrees with the literal text of the statute and provides effective protection to investors as contemplated by Congress. That long-standing interpretation was properly upheld by the Court of Claims pursuant to the principle that the construction of a statute by the administrative agency charged with its enforcement should be followed unless there are compelling indications that it is wrong. See *E.I. duPont deNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *United States* v. *National Association of Securities Dealers*, *supra*, 422 U.S. at 719; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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